

ZELL & COX LAW, P.C.
A Native Practice Group
 1875 I Street, N.W., Suite 500
 Washington, D.C. 20006

PATRICIA M. ZELL
MICHAEL D. COX

TELEPHONE
202 429 2055/2056
FACSIMILE
202 429 9574

November 15, 2006

Philip N. Hogen
Chairman
National Indian Gaming Commission
Suite 9100
1441 L Street, N.W.
Washington, D.C. 20005

Re: Comments on Class II Classification Standards,
Technical Standards, and Electronic Facsimile
Definition

Dear Chairman Hogen:

On behalf of Multimedia Games, Inc. ("MGAM"), I submit the following additional comments on the National Indian Gaming Commission's proposed Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium using "Electronic, Computer, or Other Technologic Aids", Technical Standards and revisions to the term "electronic or electromechanical facsimile".

MGAM has been an industry leader in the development of class II electronic bingo games. Over the years we have expended substantial sums to develop class II bingo systems and to obtain approval from the National Indian Gaming Commission (the "NIGC"). MGAM also has expended substantial sums in litigation costs defending one of their games, MegaMania, in litigation brought by the Department of Justice in the federal courts in Oklahoma and California as well as the Tenth and Ninth Circuit Courts of Appeal. While we prevailed in that litigation and helped develop case law that gave further clarity to the legal

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differences between a technologic aid and electronic facsimile, the proposed regulations, we believe, take a significant step backwards and would create more confusion and uncertainty.

At the outset, we believe that any regulations modifying the definition of electronic facsimile or establishing class II game classification standards that do not have the concurrence of the Department of Justice will provide no certainty to Indian tribes or manufacturers that once a class II gaming designation has been obtained from the NIGC, the Department of Justice or an individual United States Attorney will not initiate a civil forfeiture or criminal action. Without DOJ concurrence with NIGC regulations regarding class II gaming definitions and classifications, this entire rulemaking process is counterproductive.

On September 19, 2006, MGAM, along with other manufacturers, testified on the devastating economic impact the proposed regulations would have on the existing class II gaming market. Our comments herein will focus on legal and technical problems with the proposed rules.

The stated intent of the proposed rules is to draw a “bright line” between class II technologic aids and class III electronic facsimiles. But rather than simply draw a legal bright line, the NIGC attempts to draw a visual or physical bright line. By drawing a visual bright line, the NIGC ignores the IGRA and existing case law. The end result is a bingo game that is not allowed to take maximum advantage of electronic technology.

Electronic or Electromechanical Facsimile Definition

The proposed rule would change the definition of “electronic or electromechanical facsimile” to the following:

- (a) Electronic or electromechanical facsimile
means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game.
- (b) Bingo, lotto, and other games similar to bingo are facsimiles when:
 - (1) The electronic or electromechanical format replicates a game of chance by incorporating all of the fundamental characteristics of the game, or

- (2) An element of the game's format allows players to play with or against a machine rather than broadening participation among competing players.

According to the NIGC, this change is necessary to "make[] clear that all games including bingo, lotto and 'other games similar to bingo,' when played in an electronic medium, are facsimiles when they incorporate all of the fundamental characteristics of the game." 71 Fed. Reg. 30,234. This definition does not provide the clarity intended by the NIGC. It is not clear what is meant by electronic or electromechanical "format" or what it means to "incorporate" the fundamental characteristics of the game. Is the format an electronic player station or an electronically assisted bingo system? If the reference to format means a bingo system, of which electronic player stations are one component, then the definition is contrary to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (the "IGRA") and the case law.

The playing of bingo conducted on a game system that permits players to interact on electronic player stations to participate in a linked game does not make the bingo game a "facsimile." Rather, a bingo game played using technologic aids, that are expressly permitted by 25 U.S.C. 2703(7)(A)(i)), only becomes a facsimile if the technology permits the player to play with or against a machine rather than with or against other players. The courts have agreed with this interpretation.

In the MegaMania cases, the courts ruled that MegaMania is not an exact copy or duplicate of bingo and thus not a facsimile because the game of bingo is not wholly incorporated into the player station; rather, the game of bingo is **independent from the player station, so that the players are competing against other players in the same bingo game and are not simply playing against the machine.** See United States v. 103 Electronic Gambling Devices, 223 F.3d 1091, 1100 (9th Cir. 2000); United States v. 162 MegaMania Gambling Devices, 231 F.3d 713, 724 (10th Cir. 2000). The NIGC's proposed definition ignores this distinction, and unlawfully restricts the meaning of technologic aids.

Class II Classification Standards

The proposed rule would restrict tribes to traditional bingo, allow only minor variations for games similar to bingo and impose arbitrary limitations designed to slow game play, restrict prize values and mandate levels of player participation. These arbitrary restrictions are contrary to the IGRA and case law.

The IGRA specifies the requirements for a game to qualify as class II bingo, and the three criteria are the only requirements. As the Ninth Circuit held in the MegaMania litigation:

The Government's efforts to capture more completely the Platonic "essence" of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhood or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo.

There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo so why would Congress have included them if they were not meant to be exclusive?

103 Electronic Gambling Devices, 223 F.3d at 1096. The game classification restrictions go beyond the three statutory criteria, and thus violate the IGRA and the decision of the Ninth Circuit.

Summary of comments on proposed Technical Standards for Class II electronic player stations

While we fully support technical specifications that would ensure the secure and efficient operation of Class II games, implementation of the technical specifications as proposed would have severe economic and logistical **ramifications. The combination of these technical requirements and the application of the very restrictive proposed Class II Rules would be economically devastating to the Tribes and to the manufacturers that may or may not be able to offer Class II electronic gaming alternatives to them in the future.**

The gaming systems and electronic player stations provided by Multimedia Games are among the most robust in the industry. Even from that starting point, however, we would have to replace a significant portion of the thousands of player stations we currently have deployed and we would have to upgrade the remainder of the fleet in the field. In every installation, we would have to

replace the local servers with much more robust servers in order to support the linked player station networks.

Specific Issues:

547.3 Definitions. A significant omission in the definitions of the proposed standards is any mention of magnetic stripe cards used in game play or player tracking systems. Since the vast majority of Multimedia Games' Class II systems rely on card accounting and player tracking, it is important that these instruments be included.

547.4 (a) "Six months after publication." In our case, this time frame is simply impossible to meet. We believe it will take at least nine months to complete development and internal testing of the hardware and software. At that point, these new systems can be submitted for independent testing, where typically it takes 4-6 months to complete that process. Only once that is completed can we proceed with the field replacement and retrofit process, which we believe would take at least six months considering the thousands of Class II player stations and dozens of Tribal gaming sites on our network.

547.6 Servers. "Remote access allowed but disabled by default." Multimedia Games' Class II networks link players at more than 50 locations on Indian lands throughout North America. Our ability to operate, manage and provide around-the-clock customer support would be notably impaired. This restriction would also severely limit the critical functionality of our centralized downloadable software system, which is an important capability that serves our Tribal customers in both the distribution of new game products and ongoing support of existing games.

547.7 Player Terminals. Again, no inclusion of standards for magnetic card readers. Separate locks for the CPU area. Additional meters required, also in a separate locked enclosure. Access switches to be added for all enclosures. These requirements increase the cost of Class II player stations to a level essentially the same as those for Class III slot machines. Given the much more limited revenue potential of Class II vs Class III games, legitimate manufacturers would have a hard time justifying the cost going forward.

547.10 Terminal Software. While Multimedia Games' current systems already incorporate most of the requirements listed, the monitoring and meter

recording portions that are an extension of the player terminal requirements of section 547.7 would require the upgrading or replacement of terminals to include significantly larger hard disk drives (HDD) and, to avoid any performance degradation, more robust core processing units (CPU).

547.11 Critical Memory. As in section 547.10, the audit and meter recording and recall provisions would require significantly more random access memory (RAM) at the terminal level on most of our deployed player stations.

547.12 Meters. As noted above, the additions of the meters and switches required under the proposed specifications, coupled with the increased HDD and RAM to support these functions, would increase the costs of the player terminals to a level that may be beyond economic viability.

547.15 Money and credit handling. We believe our fielded electronic player stations are already compliant with this provision; however, it is unclear exactly what is intended by the requirement that card readers "retain cards."

We appreciate the opportunity to present these comments. We respectfully request that the NIGC withdraw these proposed rules and work with the tribes and manufacturers on developing class II regulations that are consistent with the IGRA and existing case law and strike an appropriate balance between Congress' intent that tribes have maximum flexibility in the use of technology to conduct class II games while prohibiting electronic facsimiles in the absence of a tribal-state compact.

Sincerely,

A handwritten signature in black ink that reads "Michael Cox". The signature is fluid and cursive, with the first name "Michael" written in a larger, more prominent script than the last name "Cox".

Michael Cox